UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION SIX

ROOD TRUCKING COMPANY INCORPORATED[1]

Employer

and **Case** 6-RC-11679

AMERICAN POSTAL WORKERS UNION
PITTSBURGH METRO AREA POSTAL
WORKERS, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before Thomas M. Stefanac, a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to the undersigned Regional Director.[2]

Upon the entire record[3] in this case, the Regional Director finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

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[1] The name of the Employer appears as amended at the hearing.

[2] Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 l4th Street, N.W., Washington, D.C. 20570-000l. This request must be received by the Board in Washington by June 9, 1999.

[3] The Petitioner filed a timely brief, which has been duly considered by the undersigned. The Employer did not file a brief in this matter.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved claims to represent certain employees of the Employer.

As amended at the hearing, the Petitioner seeks to include in a single, employer-wide unit all full-time and regular part-time drivers employed by the Employer pursuant to a contract with the United States Postal Service at facilities located in Pennsylvania, New York, Ohio and Michigan; excluding office clerical employees and guards, professional employees and supervisors as defined in the Act, and all other employees.

The Employer asserts that the Petitioner should be disqualified from representing the petitioned-for unit. In support of this position, the Employer contends that the Petitioner possesses no collective bargaining experience in the private sector and it argues that the unit employees would be in direct competition with other employees whom the Petitioner currently represents in the public sector. The Employer further seeks to disqualify the Petitioner from representing the petitioned-for employees on the ground that it would be difficult for the Pittsburgh-domiciled labor organization to represent unit employees who work in four separate states.

The Board has long held that a union may not represent the employees of an employer if there exists a conflict of interest on the part of the union that would jeopardize a good-faith collective bargaining relationship between the parties. In order to find that a union has a disqualifying conflict of interest, the Board requires a showing of a "clear and present danger" of interference with the collective bargaining process. Alanis Airport Services, Inc., 316 NLRB 1233 (1995), citing Bausch & Lomb Optical Company, 108 NLRB 1555 (1954). The Board has found that disqualification is appropriate, for example, where there exists a personal financial relationship between executives of a labor organization and the employer whose employees that union seeks to represent. See, e.g., Pony Express Courier Corp., 297 NLRB 171 (1989) and Garrison Nursing Home, 293 NLRB 122 (1989).

The burden of proof for establishing that disqualification is justified lies with the Employer. The burden is a particularly heavy one, based on the Board's fundamental principle that the "strong public policy favoring free choice of a bargaining agent by employees" is not to be "lightly frustrated." Quality Inn Waikiki, 272 NLRB 1, 6 (1984), enfd., 783 F2d 1444 (9th Cir. 1986), citing Sierra Vista Hospital, Inc., 241 NLRB 631, 633 (1979). . A review of the record establishes, and I find, that the Employer has failed to meet its burden of showing that a disqualifying conflict of interest exists on the part of the Petitioner herein.

As noted, the Employer calls for the Petitioner's disqualification based on assertions that the Petitioner possesses no collective bargaining experience in the private sector; that the unit employees would be in direct competition with other employees whom the Petitioner currently represents in the public sector; and that the Pittsburgh-domiciled Petitioner would "dominate" unit employees who work for the Employer in Ohio, Michigan and New York. The Employer's assertions regarding disqualification are, however, wholly unsubstantiated by record evidence. While it is true that the Petitioner has not yet represented private sector employees, the record reveals precedent for such representation, where the Board recently certified an affiliated local of the American Postal Workers Union in North Carolina as the representative of private sector employees and bargaining between the parties is underway. Notably, the Employer neither adduced evidence nor provided any case authority to support its contention that the Petitioner should be precluded from representing private sector employees of the Employer simply because it has heretofore represented public sector employees. Further, the evidence clearly establishes that the Petitioner is in no manner precluded by its constitution and/or by-laws from representing the petitioned-for employees. Cf., United Truck and Bus Service Co., 257 NLRB 343 (1981) (Board dismissed petition based on requirement of union's constitution that represented employees be public sector employees).

With respect to the Employer's suggestion that the Petitioner should be disqualified from representing the petitioned-for employees because the Employer is in competition with the public sector employees of the U.S.P.S. whom the Petitioner also represents, the record

evidence also fails to support this contention. To the contrary, the record establishes that, while U.S.P.S. employees whom the Petitioner currently represents and employees of the Employer all handle the mail, their functions and duties are distinct. Specifically, the currently represented U.S.P.S. employees transport the mail locally, from the General Mail Facility to nearby stations and branch offices. The petitioned-for drivers transport their cargo "over-the-road," in long-distance trips utilizing large tractor-trailer rigs. Absent any additional evidence regarding actual competition between the Employer's drivers and the currently represented U.S.P.S. employees, the Employer's argument that the Petitioner should be disqualified on these grounds is mere speculation and, as such, is insufficient to warrant disqualification. Alanis Airport Services, Inc., supra (Board found that the Employer failed to meet its burden supporting disqualification where a possible conflict of interest was speculative).

Equally unsubstantiated by record evidence or case authority is the Employer's assertion that the Petitioner should be disqualified from representing the petitioned-for employees on the grounds that the unit would be dominated by the Pittsburgh-domiciled officers and members. It is undisputed that the Petitioner's offices are located in Pittsburgh and that its executives live in the greater Pittsburgh area. The record reveals, however, that the Petitioner also employs state, regional and national officials, whose responsibility it is to provide representation to all members, regardless of the city in which they work. While the Petitioner's membership meetings are routinely held in the greater Pittsburgh area, there is no requirement that such meetings be restricted to Pittsburgh and they have, in fact, been held in other locations. The Petitioner additionally provides all members with permission to contact its offices through the use of collect calls, thereby making representation accessible to all members equally, no matter how great the distance between the work location and the Petitioner's home offices. In the absence of any actual evidence that the Petitioner would misuse its Section 9(a) status, the Employer's arguments regarding domination are merely speculative and do not justify disqualifying the Petitioner from representing the petitioned-for drivers. For the reasons stated above, and the record as a whole, I therefore find that the Petitioner's representation of the

Employer's drivers does not constitute a clear and present danger to the collective bargaining process and I shall not disqualify the Petitioner from representing the requested unit.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(l) and Section 2(6) and (7) of the Act.

Although the parties are in accord with respect to the composition of the unit, described above, the Employer, contrary to the Petitioner, contends that the employer-wide unit that Petitioner seeks to represent is overly broad, and therefore inappropriate, based on geographic distances between branches of the Employer's business. There are approximately 111 employees in the petitioned-for unit, including an estimated 16 employees who work as "extra" drivers.[4] There is no history of collective bargaining for any of the employees involved herein.

The Employer's Operations

The Employer, an Ohio corporation with its principal office located in Mineral Ridge, Ohio, is engaged in the trucking industry as a contract carrier for the United States Postal Service (hereinafter, "U.S.P.S."). The Employer utilizes over-the-road tractor-trailer rigs for hauling the mail, its exclusive cargo. George Rood serves as the Employer's owner and president.

The Employer's corporate offices are located in Mineral Ridge, Ohio, approximately nine miles from Youngstown, Ohio (most commonly and hereinafter referred to as "the Youngstown facility"). The Youngstown facility houses the Employer's administrative offices, including personnel, technical and accounting services. President Rood reports to the Youngstown facility, as do the Employer's dispatcher, payroll clerk, safety director, maintenance director and clerical staff (a total of nine people). The Employer also maintains a body shop/garage at the Youngstown facility, to which six maintenance employees and a shop foreman report.[5] Fifteen

[4] The parties are in agreement that these "extra" drivers constitute the "regular part-time" employees whom the Petitioner seeks to represent.

[5] The Petitioner does not seek to represent the maintenance employees and the Employer does not contend that the maintenance employees should be included in any unit found appropriate herein.

of the drivers whom the Petitioner seeks to represent additionally report to the Youngstown facility.

The Employer operates a second facility that is located in Morris, Pennsylvania, just north of Pittsburgh, Pennsylvania (hereinafter, "the Pittsburgh facility"). The Pittsburgh facility houses a small garage, to which one mechanic and a shop supervisor report. The Pittsburgh facility is further comprised of a large parking lot and fuel tanks for the Employer's trucks. A total of 29 drivers in the requested unit work out of the Pittsburgh facility.

Of the remaining 54 drivers in the petitioned-for unit, 28 are employed by the Employer in Cleveland, Ohio, four are employed in Canton, Ohio and five work out of Akron, Ohio. The Employer also employs 10 drivers in Buffalo, New York; six drivers in Rochester, New York; five drivers in Syracuse, New York; five drivers in Utica, New York; and two drivers in New York City, New York. Finally, the Employer employs one driver in Detroit, Michigan and one driver in Harrisburg, Pennsylvania. While the Employer employs its 111 drivers in 12 cities throughout four states, its physical facilities are limited to the Youngstown and Pittsburgh locations. Drivers whom the Employer employs in the remaining cities pick up and drop off their rigs from designated parking lots in those areas, without reporting to any type of building.

Scope of the Unit

As stated above, the Petitioner seeks to represent an employer-wide unit comprised of all drivers whom the Employer employs, regardless of the cities in which they work, while the Employer contends that the petitioned-for unit is overly broad, and therefore, inappropriate.[6] Based on well-established Board principles, the Petitioner's requested unit is presumptively appropriate, inasmuch as Section 9(b) of the Act specifically cites the employer-wide unit as the first in a list of those units appropriate for collective bargaining.[7] As a general rule, the Board

[6] The Employer has not indicated what, if any, alternative unit it would deem to be appropriate in these circumstances.

[7] Section 9(b) of the Act provides, in pertinent part: "The Board shall decide in each case whether…the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof."

will "grant a company-wide unit to a labor organization unless it is affirmatively shown that a smaller one is more appropriate." Western Electric Co., 98 NLRB 1018, 1032 (1952). See also, Greenhorne & O'Mara, Inc., 326 NLRB No. 57 (1998); Livingstone College, 290 NLRB 304 (1988); and Montgomery County Opportunity Board, Inc., 249 NLRB 880 (1980). Accordingly, the Employer bears the burden of establishing that the petitioned-for employer-wide unit is inappropriate. Greenhorne & O'Mara, supra, slip op., p. 3. Relevant factors for determining whether the Employer has met its burden include employees' duties, the terms and conditions of their employment, functional integration of the Employer's operations and employee interchange.

The record evidence establishes that the petitioned-for employees all share the same job duties, regardless of the city in which they work. In this regard, the drivers are responsible for retrieving and returning trucks to a central location and for hauling the loads of mail from one U.S.P.S. facility to another.

All employee drivers are paid according to the same wage scale, the parameters of which are set by the Department of Labor, Wage and Hours Division. All drivers are paid according to the same payroll schedule, regardless of the city in which they work, and they all receive their paychecks from the Employer's Youngstown office.

The employees in the petitioned-for unit enjoy the same fringe benefits, no matter where they work. Thus, for example, all employees of the Employer participate in the same retirement plan, which is funded by contributions based on hours worked. Coverage pursuant to the Employer's health insurance plan is available to all employees whom the Petitioner seeks to represent, regardless of the city to which they are assigned, and the Employer's contribution toward the premium for that plan is based on the number of hours each employee works.

The Employer requires that all drivers agree to work as many as 70 hours during an eight-day period. Working hours for the regularly scheduled drivers are generally determined by the length of route to which the driver is assigned. The drivers bid on the routes on a yearly

basis, in June of each year, and the bids are awarded based on seniority. Bidding for the routes is conducted at each location where the Employer employs drivers.

As noted previously, the Employer employs an unspecified number of "extra" drivers at each location who work on an on-call basis.[8] The on-call drivers do not bid on routes, but are instead required to accept any route the Employer assigns to them. The on-call drivers may only refuse route assignments if the assignments arise on their scheduled days off from work.

The Employer utilizes a single Personnel Manual for all employees. Employees working at all of the Employer's 12 locations are therefore subject to the same company rules and procedures. Similarly, the Employer's disciplinary system is implemented throughout the entire company, regardless of location.

The record further reveals that the Employer's operations are fully centralized at its Youngstown facility. In this regard, all accounting matters for the various locations are handled through the Youngstown office, as are the payroll functions. The Employer conducts all of its hiring from the Youngstown office, regardless of where the driver would be permanently situated, if selected for employment. The personnel policies and procedures found in the Employer's Personnel Manual all emanate from the Employer's Youngstown offices. The Employer similarly issues all disciplinary actions from the Youngstown facility, regardless of where the infraction occurs.

The record further discloses that the Employer schedules and dispatches all work from the Youngstown facility. In the event that the Employer needs additional drivers, it schedules drivers from one location (e.g., Pittsburgh) to "cover" routes in other areas (e.g., Harrisburg). While the frequency of such temporary transfers is unclear from the record, President Rood

[8] With the exception of President Rood's testimonial estimate that approximately 95 of 111 drivers are regularly scheduled employees, the Employer was unable to provide any information during the hearing with respect to how many "extras" it employs at each location, or as to how many hours each of the "extras" works.

provided general testimony that the Employer has actually flown drivers from one location to another, in order to make certain that a scheduled route was covered.[9]

The Act does not require that the unit for bargaining be the only appropriate unit, or the ultimate unit, or even the most appropriate unit; rather, a unit need only be "appropriate" to ensure that employees receive "the fullest freedom in exercising the rights guaranteed by this Act." Dezcon, Inc., 295 NLRB 109 (1989); P.J. Dick Contracting, 290 NLRB 150 (1988); PPG Industries, Inc., 180 NLRB 477 (1969); Black & Decker Manufacturing Company, 147 NLRB 825 (1964).

As previously noted, the employer-wide unit that the Petitioner seeks to represent herein is presumptively appropriate and it is the Employer's burden to rebut that presumption. Greenhorne & O'Mara, supra. The record evidence establishes, and I find, that the Employer has failed to sustain its burden of showing that the employer-wide unit is inappropriate.

In support of its contention that the requested unit is inappropriate, the Employer argues that the geographic distances between and among the various locations to which the drivers report would render proper representation impossible. While the record reveals that employees who work out of Utica, New York are situated over 390 miles from those employees who work out of the Pittsburgh facility, this fact alone is insufficient to overcome the presumptive appropriateness of the employer-wide unit, particularly where the employees in the petitioned-for unit share identical duties and other terms and conditions of employment. Similarly, the geographical distances between and among reporting locations pale in significance when compared to the undisputed and overwhelming record evidence that the Employer's labor relations are wholly centralized in the Youngstown facility and that there is a high degree of functional integration among the Employer's operations. Accordingly, based on the above and the record as a whole, I find that the petitioned-for employees share a substantial community of interest and that the single, employer-wide unit the Petitioner seeks to represent is appropriate.

[9] The record contains no furher details with respect to temporary transfers. The record does not contain any evidence of drivers being permanently transferred from one location to another.

Eligibility of the "Extra" Drivers

As previously noted, the parties are in accord that the "part-time regular drivers" whom the Petitioner seeks to represent are the same individuals whom the Employer regards as "extras." It is further undisputed the "extra" drivers share the same supervision as regular full-time drivers and perform the same duties as full-time drivers. The "extra" employees also receive the same per hour wages and benefits as full-time drivers.

The "extra" drivers work on an on-call basis, making themselves available to accommodate the Employer's needs when the regularly scheduled full-time drivers take vacation or call off, and when the U.S.P.S. requests extra runs. Like the full-time drivers, the "extra" employees must be willing to work as many as 70 hours per eight-day period. The record discloses that most of the estimated 16 extra drivers work during most payroll periods and that they work on a fairly regular basis with some frequency. Other extra drivers work far less frequently and there are possibly some payroll periods in which certain extra drivers do not work at all. Unavailable at the hearing, however, was any specific evidence showing exactly who among the named employees works as an "extra" and exactly how many hours each of these on-call drivers has worked during any given period.[10]

In determining whether on-call or part-time employees who perform unit work should be included in the bargaining unit, the Board considers the regularity of their employment. Employees are considered to have been regularly employed when they have worked a substantial number of hours within the period of their employment prior to the eligibility date. Under the Board's longstanding and most widely used test for voter eligibility in these circumstances, any on-call or extra employee "who regularly averages four hours or more per week for the last quarter prior to the eligibility date has a sufficient community of interest for

[10] In presiding over this matter, the Hearing Officer offered the Employer ample opportunity to present its evidence regarding the extra employees and the actual number of hours they work. The Employer neither proffered the evidence in question nor requested additional time in which to gather it. (Cf., North Manchester Foundry, 328 NLRB No. 50 (May 6, 1999).

inclusion in the unit" and is eligible to vote in the election. Davison-Paxon Company, 185 NLRB 21, 24 (1970).

Although no single eligibility formula must be used in all cases, the Davison-Paxon formula is the one most frequently applied, absent a showing of special circumstances.[11] Saratoga County Chapter NYSARC, 314 NLRB 609 (1994); Trump Taj Mahal Casino, 306 NLRB 294, 295 (1992). See also, Tri-State Transportation Co., Inc., 289 NLRB 356 (1988); V.I.P. Movers, Inc., 232 NLRB 14 (1977). Application of this formula is equally appropriate where, as here, the employer is unable to furnish precise information as to the work schedules of the petitioned-for employees. Davison-Paxon Company, supra; Metro Cars, Inc., 309 NLRB 513 (1992); East Bay Newspapers, Inc. d/b/a Contra Costa Times, 223 NLRB 327 (1976).

There is no requirement under the Davison-Paxon formula that the employee(s) work every week. See, e.g., Sisters of Mercy Health Corp., 298 NLRB 483 (1990). However, the Board has found that employees whose average number of hours per week approximates the requisite four hour per-week threshold, but does not reach it, will not be eligible to vote. Saratoga County Chapter NYSARC, supra, at 610, fn. 5 (employee who averaged 3.4 hours per week was found ineligible to vote).

Inasmuch as it is impossible to determine from the record who among the petitioned-for employees would qualify as regular part-time employees, and noting that the "extra" drivers share a substantial community of interest with the regularly scheduled full-time drivers, I find it appropriate to apply the Davison-Paxon formula in the instant matter. Eligible to vote as regular part-time employees will be only those "extra" drivers who averaged four hours or more of work per week in the calendar quarter immediately preceding the date of this Decision and Direction of Election.

[11] The Board has found that such "special circumstances" do not exist so as to warrant a departure from the Davison-Paxon formula, for example, where an extension of the 13-week eligibility period would enfranchise more employees due to the increased demand for substitute employees during vacation periods. Saratoga County Chapter NYSARC, 314 NLRB 609 (1994).

Accordingly, I find that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time drivers employed by the Employer pursuant to a contract with the United States Postal Service at facilities located in Pennsylvania, New York, Ohio and Michigan; excluding office clerical employees and guards, professional employees and supervisors as defined in the Act, and all other employees.

DIRECTION OF ELECTION

An election by secret ballot will be conducted by the undersigned Regional Director among the employees in the unit set forth above at the time and place set forth in the Notice of Election to be issued subsequently, subject to the Board's Rules and Regulations.[12] Eligible to vote are those employees in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before

[12] Pursuant to Section l03.20 of the Board's Rules and Regulations, official Notices of Election shall be posted by the Employer in conspicuous places at least 3 full working days prior to l2:01 a.m. of the day of the election. As soon as the election arrangements are finalized, the Employer will be informed when the Notices must be posted in order to comply with the posting requirement. Failure to post the Election Notices as required shall be grounds for setting aside the election whenever proper and timely objections are filed.

the election date and who have been permanently replaced.[13] Those eligible shall vote whether or not they desire to be represented for collective bargaining by American Postal Workers Union, Pittsburgh Metro Area Postal Workers Union, AFL-CIO.

Dated at Pittsburgh, Pennsylvania, this 26th day of May 1999.

/s/Gerald Kobell
Gerald Kobell
Regional Director, Region Six

NATIONAL LABOR RELATIONS BOARD
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339-7575-2525
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[13] In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. Excelsior Underwear, Inc. 156 NLRB 1236 (l966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (l969). Accordingly, it is hereby directed that the election eligibility list, containing the full names and addresses of all eligible voters, must be filed by the Employer with the Regional Director within seven (7) days of the date of this Decision and Direction of Election. The Regional Director shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office, Room l50l, l000 Liberty Avenue, Pittsburgh, PA l5222, on or before June 2, 1999. No extension of time to file this list may be granted, except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.